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RECORD, CASE No. 15,112.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 1142.

THE PENNSYLVANIA COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE S. BENDER, ADMINISTRATOR OF THE ESTATE OF THOMAS J. BENDER, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED AUGUST 26, 1892.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 2, 1892.

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1 In the Supreme Court of Ohio.

THE PENNSYLVANIA COMPANY, Plaintiff in Error, *vs.* GEORGE S. BENDER, Administrator of Thomas J. Bender, Deceased, Defendant in Error.	Error to the Circuit Court of Holmes County.

On the 23rd day of May, A. D. 1889, came said plaintiff in error and filed in said court his petition in error as follows, to wit:

STATE OF OHIO, *City of Columbus,* } *ss:*

In the Supreme Court of Ohio.

THE PENNSYLVANIA COMPANY, Plaintiff in Error, *vs.* GEORGE S. BENDER, Administrator of Estate of Thomas J. Bender, Deceased, Defendant in Error.	Petition in Error.

2 The Pennsylvania Company for its petition in error says that at the May term, 1888, of the court of common pleas of Holmes county, Ohio, in a certain proceeding in which the defendant in error was plaintiff and the plaintiff in error was defendant a certain final judgment was rendered by said court of common pleas against said defendant in favor of said plaintiff; that afterwards, to wit, at the November term, A. D. 1888, of the circuit court of said Holmes county, Ohio, in a proceeding in error in which this plaintiff in error was plaintiff and said defendant in error was defendant, which said proceeding was brought for the purpose of reversing the aforesaid judgment and proceeding of the common pleas court, said circuit court, on motion of the defendant in error, struck said petition in error from the files; to which action of the court the plaintiff in error at the time excepted.

The original pleadings between the parties and the papers and full record of said cause, together with certified copies of the docket and journal entries in said court below, are hereto attached, marked "A," and filed herewith and made a part of this petition.

3 The plaintiff in error says there is error in said record and proceedings in this, to wit:

First. That said circuit court erred in sustaining the motion of the defendant in error to strike the petition in error of the plaintiff in error from the files of said court; to which ruling the plaintiff in error at the time excepted.

Second. That said circuit court erred in striking said petition in error from the files of said court; to which action of the circuit court the plaintiff in error at the time excepted.

Third. That the petition filed herein does not state facts sufficient to constitute a cause of action.

Fourth. That said circuit court erred in affirming the said judgment of the common pleas court.

Wherefore the plaintiff in error prays that said judgment of said common pleas court and of said circuit court may be reversed, and that the plaintiff in error may be restored to all things it has lost by reason thereof.

J. R. CAREY,
Att'y for Pl'ff in Error.

1889, May 23.—Circuit court transcript filed.

4 1889, May 23.—Original papers filed.

1889, May 23.—Precipe filed; summons issued to sheriff Holmes county; returnable June 3rd, 1889.

1889, May 23.—Papers sent to J. R. Carey, Salem, O.

1889, June 3.—Summons returned filed; endorsed: Received this writ *May* 25 day of May, 1889, at 1 p. m., and pursuant to its command I did, on 31st day of May, 1889, personally serve a true and certified copy of this writ, with all the endorsements thereon, on the within-named George S. Bender. Wm. S. Troyer, sheriff of Holmes Co., Ohio.

1889, July 15.—Papers returned; printed record filed.

Said printed record is as follows, to wit:

5 STATE OF OHIO, } *ss:*
City of Columbus, }

In the Supreme Court of Ohio.

THE PENNSYLVANIA COMPANY, Plaintiff in Error,
vs.
GEORGE S. BENDER, Administrator of Estate of Thomas J. Bender, Deceased, Defendant in Error.

Petition in Error.

The Pennsylvania Company for its petition in error says that at the May term, 1888, of the court of common pleas of Holmes county, Ohio, in a certain proceeding in which the defendant in error was plaintiff and the plaintiff in error was defendant, a certain final judgment was rendered by said court of common pleas against said defendant in favor of said plaintiff.

That afterwards, to wit, at the November term, A. D. 1888, of the circuit court of said Holmes county, Ohio, in a proceeding in error in which this plaintiff in error was plaintiff and said defendant in error was defendant, which said proceeding was brought for the purpose of reversing the aforesaid judgment and proceeding of the common pleas court, said circuit court, on motion of the defendant in error, struck said petition in error from the files; to which action of the court the plaintiff in error at the time excepted.

The original pleadings between the parties and the papers and full record of said cause, together with certified copies of the docket

and journal entries in said court below, are hereto attached, marked "A," and filed herewith and made a part of this petition.

The plaintiff in error says there is error in said record and proceedings in this, to wit:

6 First. That said circuit court erred in sustaining the motion of the defendant in error to strike the petition in error of the plaintiff in error from the files of said court; to which ruling the plaintiff in error at the time excepted.

Second. That said circuit court erred in striking said petition in error from the files of said court; to which action of the circuit court the plaintiff in error at the time excepted.

Third. That the petition filed herein does not state facts sufficient to constitute a cause of action.

Fourth. That said circuit court erred in affirming the said judgment of the common pleas court.

Wherefore the plaintiff in error prays that said judgment of said common pleas court and of said circuit court may be reversed, and that the plaintiff in error may be restored to all things it has lost by reason thereof.

J. R. CAREY,
Attorney for Plaintiff in Error.

THE PENNSYLVANIA COMPANY, Plaintiff in Error,
vs.
GEORGE S. BENDER, Administrator of Estate of Thomas J. Bender, Deceased, Defendant in Error.

Precipe.

Issue summons in error.

J. R. CAREY,
Attorney for Plaintiff in Error.

STATE OF OHIO,
Holmes County.

In the Circuit Court.

THE PENNSYLVANIA COMPANY, Plaintiff in Error,
vs.
GEORGE S. BENDER, Administrator of Estate of Thomas J. Bender, Deceased, Defendant in Error.

Petition in Error.

The above-named plaintiff in error for its petition in error says that at the May term, 1888, of the court of common pleas

7 of Holmes county, Ohio, in a suit theretofore begun in said court, wherein said George S. Bender, administrator of the estate of Thos. J. Bender, deceased, was plaintiff and The Pennsylvania Company was defendant, the said court of common pleas rendered a certain final judgment in favor of said plaintiff against said defendant. A transcript of said judgment and the original

files in said case, duly authenticated by said clerk of said common pleas court, are filed herewith, marked A, and made a part of this petition in error.

Said plaintiff in error says that there is error in said judgment and the rendition thereof and in the proceedings of the said common pleas court in this, to wit:

That said common pleas court at the time of said proceedings and the rendition of said judgment had no jurisdiction of this cause, for that, as plaintiff in error now avers, it at the time of the commencement of said action was and still is a corporation organized and existing solely under and by virtue of the laws of Pennsylvania, and that said defendant in error, the plaintiff in the court below, was at the time of the commencement of this action and still is a citizen and resident of the State of Ohio, and that said Thomas J. Bender, deceased, was in his lifetime a citizen and resident of the State of Ohio, and that said plaintiff in error, as defendant in the court below, had, after the time that it, as such defendant, was required by the laws of the State of Ohio to answer or plead to the petition of the said plaintiff below and before the trial of said cause in said court, to wit, on or about the first day of March, 1888, duly filed in the circuit court of the United States for the northern district of Ohio, eastern division, a petition and affidavit alleging the grounds for removal aforesaid, for the removal of this cause to said circuit court, together with a bond, duly approved, in all respects in conformity with the statutes of the United States in such cases made and provided.

The plaintiff in error further says that after due consideration said United States court for the northern district of Ohio, eastern division, ordered and adjudged that said cause be removed from the court of common pleas of Holmes county to said circuit court, which was done, and said cause was duly entered for trial upon the docket of said court and is still pending therein. A copy of the said order of the said United States circuit court, duly certified by the clerk thereof, is hereto attached, marked "B," and made a part of this petition in error.

8 Plaintiff in error further says that it filed in said United States circuit court, among other things, a copy of the record of this cause in said State court, duly certified for such purpose by the clerk thereof.

Finally, plaintiff in error says that said State court and the plaintiff in this cause therein had knowledge and notice in fact of said action and order of said United States circuit court and the proceedings therein long before the trial of this cause in said State court.

Wherefore plaintiff in error prays that said judgment of said court of common pleas of Holmes county may be declared null and void and of no effect and this plaintiff in error may be restored to all things that it has lost by reason thereof.

J. R. CAREY,
Attorney for Plaintiff in Error.

STATE OF OHIO, *Columbiana County,* } ss:

J. R. Carey, being first duly sworn, says that he is the attorney for the Pennsylvania Company, and that the allegations of the foregoing petition are true as he verily believes.

J. R. CAREY.

Sworn to and subscribed by the said J. R. Carey before me this 6th day of July, 1888.

[NOTARIAL SEAL.] WM. C. BOYLE,
Notary Public.

Precipe to Clerk.

Issue summons in error in this case, returnable according to law.

J. R. CAREY,
Attorney for Plaintiff in Error.

EXHIBIT "B."

THE UNITED STATES OF AMERICA, *Northern District of Ohio, Eastern Division,* } ss:

At a stated term of the circuit court of the United States within and for the eastern division of the northern district of Ohio, begun and held at the city of Cleveland, in said district, 9 on the first Tuesday in February, being the seventh day of said month, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States of America the one hundred and twelfth—present, the Hon. Martin Welker, district judge—among the proceedings then and there had were the following, to wit:

GEORGE S. BENDER, Administrator,
vs.
THE PENNSYLVANIA COMPANY. } Law.

TUESDAY, *March* 6, 1888.

This day came on to be heard the petition of the defendant for an order for the removal of this case from the court of common pleas of Holmes county, Ohio, and, it appearing to the court that the defendant has filed in this court its petition, bond, and affidavit under the 2d section of the act of Congress of March 3d, 1887, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts and for other purposes, &c.," from which it appears to the court that said affidavit is in compliance with said 2d section of said act of Congress, and that said bond is sufficient and satisfactory, and that said defendant by its petition, affidavit, and bond has shown that it is entitled to remove cause to this court.

THE UNITED STATES OF AMERICA, *Northern District of Ohio, Eastern Division,* } ss:

I, Augustus J. Ricks, clerk of the circuit court of the United States within and for said district, do hereby certify that the within is a true copy of an order entered upon the journal or the proceedings of said court in the therein-entitled cause; that I have compared the same with the original entry of said order and it is a true transcript therefrom and of the whole thereof.

Witness my official signature and the seal of said court, at Cleveland, in said district, this twentieth day of March, A. D. [SEAL.] 1888, and in the 112th year of the Independence of the United States of America.

AUGUSTUS J. RICKS, *Clerk,*
By O. C. BEATTY, *Deputy Clerk.*

10 THE STATE OF OHIO, *Holmes County,* } ss:

In the Circuit Court.

THE PENNSYLVANIA COMPANY, Plaintiff in Error,
vs.
GEORGE S. BENDER, Administrator of the Estate of Thomas J. Bender, Deceased, Defendant in Error.

Motion.

Now comes the defendant in error and moves the court to strike from the files the petition in error filed in this case for the reason that said petition in error does not set out any error appearing upon the records, and that the said circuit court has no jurisdiction to hear and determine the matters set forth in said petition in error.

CRITCHFIELD & HUSTON,
Attorneys for Defendant in Error.

THE STATE OF OHIO, *Holmes County,* } ss:

In the Court of Common Pleas.

GEORGE S. BENDER, as Administrator of the Estate of Thomas J. Bender, Deceased, Plaintiff,
vs.
THE PENNSYLVANIA COMPANY, Operating the Pittsburgh, Ft. Wayne and Chicago Railway Company, Defendants.

Petition.

The plaintiff says that he was duly appointed and qualified by the probate court of Holmes county, Ohio, as the administrator of the estate of Thomas J. Bender, deceased.

That the Pennsylvania Company, operating the Pittsburgh, Ft Wayne and Chicago railway, is a foreign corporation operating a

railway commencing at the city of Pittsburgh, State of Pennsylvania, and passing through said county and terminating at the city of Chicago, in the State of Illinois.

That the defendants on the 28th day of February, A. D. 1887, by their servents, so negligently and unskillfully drove and man-
11 aged an engine and a train of cars attached thereto upon and along said railway, which the said Thomas J. Bender was then lawfully crossing at what is commonly known as the Morgan Priest crossing, near the house of said Morgan Priest, where the State road from Loudonville, in Ashland county, Ohio, to Wooster, in Wayne county, Ohio, crosses said railway, in Washington township, in said county, with two horses attached to a wagon, that the said engine and train of cars were driven and struck against said horses and wagon, whereby the said Thomas J. Bender was thrown from said wagon and killed without any fault or negligence on the part of the said Thomas J. Bender or the said plaintiff.

The said Thomas J. Bender at the time of his death had neither wife or children, but left George S. Bender and Margaret S. Bender, his parents, and Jacob H. Bender, Mary C. Bender, John N. Bender, Lydia B. Bender, Mertie O. Bender, and William Bender, his brothers and sisters; to the damages of the plaintiff in the sum of ten thousand dollars, for which he prays judgment.

CRITCHFIELD & HUSTON,
Attorneys for Plaintiff.

THE STATE OF OHIO, }
Holmes County, } ss:

George S. Bender, being first duly sworn, says that the facts stated and allegations contained in his foregoing petition are true as he believes.

GEORGE S. BENDER.

Sworn to before me and signed in my presence this 12th day of September, 1887.

J. J. STROME, *Clerk.*

STATE OF OHIO, }
County of Holmes. }

In the Court of Common Pleas.

GEORGE S. BENDER, as Administrator of the Estate of Thomas J. Bender, Deceased, Plaintiff,
vs.
THE PENNSYLVANIA COMPANY, Defendant.

Answer.

And now comes the defendant, The Pennsylvania Company, and by way of answer to the plaintiff's petition filed herein
12 says that it admits the corporate existence and the operation of the Pittsburgh, Ft. Wayne and Chicago railway as therein averred.

But the defendant denies each and every other allegation in said petition contained the same as if each were herein specifically set forth and denied.

J. R. CAREY.

STATE OF OHIO, } ss:
County of Columbiana, }

J. R. Carey, being first duly sworn, says that he is the attorney of The Pennsylvania Company, the defendant in the above-entitled case, and that the statements in the foregoing answer are true, as he verily believes.

J. R. CAREY.

Sworn to before me and subscribed in my presence this 30th day of September, 1887.

J. C. BOONE,
Notary Public.

STATE OF OHIO, } ss:
Holmes County, }

In the Court of Common Pleas.

GEORGE S. BENDER, Administrator of the Estate of Thomas J. Bender, Deceased, Plaintiff,
vs.
THE PENNSYLVANIA COMPANY, Defendant.

Petition for Removal to Circuit Court of the United States.

The defendant, The Pennsylvania Company, now comes and files this its petition to remove this cause from the court of common pleas of Holmes county, where the same is now pending, to the circuit court of the United States for the northern district of Ohio, eastern division.

The defendant also files herewith and makes a part hereof its affidavit in support of this petition, setting forth the grounds and causes for such removal.

This defendant further says that it is ready and willing to give bond, with good and sufficient surety, for the performance of all acts and things required of it by the provisions of the law relating to removal of causes from State courts to circuit court of the United States, and herewith offers such bond conditioned and executed as aforesaid.

13

Wherefore defendant prays that said bond may be accepted as good and sufficient surety, according to said provisions of law, and that the said suit may be removed to the circuit court of the United States for the northern district of Ohio, eastern division, and that no further proceedings be had in this court.

J. R. CAREY,
Attorney for Defendant.

STATE OF OHIO, *Columbiana County,* } ss:

J. R. Carey, being first duly sworn, says that he is the attorney for the said Pennsylvania Company, defendant above, and that he believes the allegations of the foregoing petition to be true.

J. R. CAREY.

Sworn to before me by the said J. R. Carey — subscribed in my presence this 29th day of February, 1888.

A. J. KING,
Notary Public.

STATE OF OHIO, *Holmes County,* } ss:

In the Court of Common Pleas.

GEORGE S. BENDER, Administrator of the Estate of Thomas J. Bender, Deceased, Plaintiff,
vs.
THE PENNSYLVANIA COMPANY, Defendant.

Affidavit.

James R. Carey, being first duly sworn, on his oath says that he is the attorney and agent of The Pennsylvania Company, the defendant in the above-entitled cause; that as such attorney and agent he has the sole charge of the defense of said cause and all the matters pertaining thereto, and that he is authorized to make this affidavit.

Affiant further says that the plaintiff in said cause is a resident of the State of Ohio, of the northern district, eastern division thereof; that the defendant is a corporation duly organized and existing solely under and by virtue of the laws of the State of Pennsylvania, is a resident of said State, and is not a resident of the
14 State of Ohio; that said cause is now pending in the court of common pleas of Holmes county, State of Ohio, has never been tried, and that the matter in dispute therein exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

Affiant further says that from prejudice and local influence the said defendant, The Pennsylvania Company, will not be able to obtain justice in the State court in which said cause is now pending, to wit, the court of common pleas of Holmes county, State of Ohio, or in any other State court into which said defendant has, under the laws of the State of Ohio, the right on account of such prejudice and local influence to remove said cause, to wit, the courts of common please of the counties of Stark, Tuscarawas, Coshocton, Knox, Ashland, and Wayne, adjoining said county of Holmes.

JAMES R. CAREY.

Sworn to and by the said James R. Carey subscribed in my presence this 29th day of February, A. D. 1888.

[NOTARIAL SEAL.] A. J. KING,
Notary Public in and for Columbiana Co., State of Ohio.

2—1142

STATE OF OHIO, *Holmes County,* } ss :

In the Court of Common Pleas.

GEORGE S. BENDER, as Adm'r of Thos. J. Bender, Deceased,
vs.
THE PENNSYLVANIA COMPANY, Operating the P., Ft. Wayne and C. R'y Co.

Motion.

And now comes the said plaintiff and moves to strike from the files of said case the papers filed therein of the date of March 2d, 1888, purporting to be a petition for removal and an affidavit in support thereof, for the following reasons, to wit :

1. Said papers were filed without leave of court.
2. Said papers were not filed at the time or any time before the defendant is required by the laws of the State or the rule of the State court in which the suit is brought to answer or plead to the declaration on complaint of the plaintiff, as provided in sec. 3 of the act of Congress of March 3, 1887.
3. Said papers were filed without any authority of law.

CRITCHFIELD & HUSTON,
Attorneys for Plaintiff.

15 *Docket Entries.*

Circuit and Common Pleas Courts.

Appearance Docket No. 17, page 121.

GEORGE S. BENDER, as Administrator of Estate of Thomas J. Bender, Deceased,
vs.
THE PENNSYLVANIA COMPANY, &c. } No. 1232.

September 12, 1887.—Petition filed and summons issued to sheriff of Holmes county.

September 23, 1887.—Sheriff's return of summons filed :

Received this writ September 12, 1887, at 3½ o'clock p. m., and pursuant to its command I did personally serve a true copy of this writ, with all the endorsements thereon, on T. G. Odell, agent for the within-named railway Co., Sept. 22d, 1887.

WM. S. TROYER, *Sheriff.*

Oct. 3, 1887.—Answer filed.
Jan. 4, 1888.—Depositions filed.
Feb. 3, 1888.—Depositions filed.
Feb. 13, 1888.—Depositions filed.
Feb. 20, 1888.—Depositions filed.
March 2, 1888.—Petition for removal to circuit court of the U. S. filed.

March 2, 1888.—Affidavit filed.
March 2, 1888.—Journal entry filed.
March 2, 1888.—Bond filed.
March 24, 1888.—Motion to strike from files filed.
July 10, 1888.—Bond filed.

Journal Entries.

Circuit Court Journal No. 1, page 57.

THE PENNSYLVANIA COMPANY
vs.
GEORGE S. BENDER, Administrator, &c. } No. 37. In Error.

NOVEMBER 23, 1888.

This day this cause came on to be heard upon the motion of the defendant in error to strike the petition in error from
16 the files. On consideration whereof the court sustains said motion, and it is ordered and adjudged that said petition in error be stricken from the files and the plaintiff in error pay the costs herein expended, taxed at $——, and on default that execution issue therefor; to which ruling and judgment of the court the plaintiff in error excepts.

Journal Entries.

Common Pleas Court.

GEORGE S. BENDER, as Administrator of Estate of Thomas J. Bender, Deceased,
vs.
THE PENNSYLVANIA COMPANY. } No. 1232. Civil Action.

May Term, 1888. Journal, vol. 18, page 240.

This cause is continued.

GEORGE S. BENDER, as Administrator of Estate of Thomas J. Bender, Deceased,
vs.
THE PENNSYLVANIA COMPANY. } No. 1232. Civil Action.

Journal, vol. 18, page 313.

MARCH 27, 1888.

This day this cause came on to be heard upon the motion of the plaintiff to strike from the files the petition for removal and affidavit marked filed March 2, 1888. On consideration whereof said court sustains said motion, and the said petition for removal and affidavit are ordered to be, and are hereby, stricken from the files of said case; and it is further ordered that the said defendant pay the costs of said motion, taxed at $——, and in default thereof that execution issue therefor.

17 GEORGE S. BENDER, as Administrator of the Estate of Thomas J. Bender, Deceased, vs. THE PENNSYLVANIA COMPANY. } No. 1232. Civil Action.

May Term, 1888. Journal, vol. 18, page 393.

This day came the parties herein, by their attorneys; also came the following-named persons as jurors, to wit, George W. Nowls, Conrad Schuler, Jacob Bell, Clark McDowell, Charles R. Peter, William Lemon, Henry H. Bell, Nathaniel Hershberger, Peter Brink, Aaron Moore, George M. Breitenbucher, Edward Perdue, as regular jurors for the term, who were duly impanneled and sworn according to law; and thereupon the case came on for hearing on the pleadings and evidence, and after hearing the evidence, argument, and charge of the court the jury retired to their room, in charge of the sheriff, for deliberation.

And now comes said jury into open court with their verdict in writing, signed by their foreman, and say:

"We, the jury in this case, being duly impanneled and sworn, do find for the plaintiff and assess his damages at six thousand dollars.

HENRY H. BELL, *Foreman.*"

It is therefore considered by the court that the plaintiff, George S. Bender, as administrator of the estate of Thomas J. Bender, deceased, recover from the defendant, The Pennsylvania Company, operating the Pittsburgh, Ft. Wayne and Chicago Railway Company, the said sum of six thousand dollars, together with his costs herein expended, taxed at $——, and that defendant pay its own costs, taxed at $——, and in default thereof that execution issue therefor.

18 1889, July 15.—Bill for printing record filed.
1891, Sept. 14.—Plaintiff's printed briefs filed.
1891, Sept. 24.—Proof of service of record and pl'ff's brief filed.
1891, Nov. 14—Defendant's printed briefs filed.

At the January term of our said supreme court, to wit, on Tuesday, May 17th, 1892, the following judgment was rendered, to wit:

This cause came on to be heard upon the transcript of the record of the circuit court of Holmes county and was argued by counsel. On consideration whereof it is ordered and adjudged by this court that the judgment of the said circuit court be, and the same is hereby, affirmed; and it appearing to the court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein. It is further ordered that the defendant in error recover from the plaintiff in error his costs herein expended, taxed at $——. Ordered that a special mandate be sent to the court of common pleas of Holmes county to carry this judgment into execution.

Ordered that a copy of this entry be certified to the clerk
19 of the circuit court of Holmes county " for entry."

1892, May 24.—Mandate issued.
1892, May 27.—Original papers sent clerk.

STATE OF OHIO, *City of Columbus,* } *ss:*

I, Urban H. Hester, clerk of the supreme court of Ohio, hereby certify the foregoing to be a true and complete transcript of the record and proceedings in our said supreme court in the cause of The Pennsylvania Company *vs.* George S. Bender, administrator of Thomas J. Bender, deceased, on error to the circuit court of Holmes county.

Witness my name and the seal of the supreme court of Ohio this third day of August, A. D. 1892.

[Seal of the Supreme Court of the State of Ohio.]

URBAN H. HESTER,
Clerk of Supreme Court of Ohio.

20 In the Supreme Court of Ohio.

THE PENNSYLVANIA COMPANY, Plaintiff in Error,
vs.
GEORGE S. BENDER, Administrator of Estate of Thomas J. Bender, Deceased, Defendant in Error. } Assignment of Errors.

The plaintiff in error now comes and presents an assignment of the error occurring in the record and proceedings of said court in said cause, which said plaintiff in error intends to and does assert and urge as being to *his* great damage, to wit:

1. That the said supreme court of Ohio erred in affirming the judgment of the circuit court of Holmes county, in said State of Ohio.

2. That there is error occurring in the record and proceedings of said court in said cause, in this, to wit, that the court of common pleas of Holmes county, in said State of Ohio, had no jurisdiction to try said cause or to render judgment against this plaintiff in error, defendant in said court of common pleas; that in due time and before the trial of said cause in said court of common pleas the circuit court of the United States for the northern district of Ohio, eastern division, had made an order duly removing said cause to said circuit court, and that the same had before that time been duly removed to said court, and that said circuit court of the United States had assumed and was exercising jurisdiction of said cause, and that the same had not been remanded to said State court, and that no proceedings to remand the same had been instituted by said defendant in error at or before the rendition of the judgment against this plaintiff in error and in favor of said defendant in error
21 by said court of common pleas of said Holmes county; that the circuit court of Holmes county erred in striking from the

files of said court the petition in error filed by this plaintiff in error to reverse said judgment of said court of common pleas of said Holmes county, and that said supreme court of Ohio erred in affirming said judgment of said circuit court of said Holmes county.

L. L. GILBERT,
J. R. CAREY, AND
F. J. MULLINS,
Att'ys for Pl'ff in Error.

22 [Endorsed:] No. —. In United States Supreme Court. Pennsylvania Company, pl'ff in error, *vs.* George S. Bender, adm'r Thos. J. Bender, deceased. Assignment of error.

23 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Pennsylvania Company, plaintiff in error, and George S. Bender, administrator of the estate of Thomas J. Bender, deceased, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or

24 statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 30 days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

said Supreme Court, the 25th day of July, in the year of our Lord one thousand eight hundred and ninety-two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOHN M. HARLAN,
Associate Justice Sup. Court U. S.

25 STATE OF OHIO, }
City of Columbus, } *ss:*

To the honorable Supreme Court of the United States:

Pursuant to the command of your within writ of error, directed to us, we, under our seal, distinctly and openly, the record and proceedings within mentioned, with all things concerning the same, before our supreme court, in a certain authenticated transcript to this writ attached, do send, as within we are commanded.

Seal of the Supreme Court of the State of Ohio.

In witness whereof I, Urban H. Hester, clerk of the supreme court of Ohio, have hereunto set my hand and the seal of said court this third day of August, A. D. 1892.

URBAN H. HESTER, *Clerk.*

26 UNITED STATES OF AMERICA, *ss:*

To George S. Bender, administrator of the estate of Thomas J. Bender deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Ohio, wherein The Pennsylvania Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 25th day of July, in the year of our Lord one thousand eight hundred and ninety-two.

JOHN M. HARLAN,
Associate Justice Sup. Court U. S.

27 On this third day of August, in the year of our Lord one thousand eight hundred and ninety-two, personally appeared F. J. Mullins before me, the subscriber, deputy clerk of the supreme court of Ohio, and makes oath that he delivered a true copy of the within citation to George S. Bender, administrator of the estate of Thomas J. Bender, deceased, on the 2nd day of August, A. D. 1892.

F. J. MULLINS.

Sworn to and subscribed the 3d day of August, A. D. 189–.

[Seal of the Supreme Court of the State of Ohio.]

HORACE M. CROW,
Deputy Clerk, Supreme Court.

28 Know all men by these presents that we, The Pennsylvania Company, as principal, and L. L. Gilbert, F. J. Mullins, and Enoch Totten, as sureties, are held and firmly bound unto George S. Bender, administrator of the estate of Thos. J. Bender, deceased, in the full and just sum of twelve thousand dollars, to be paid to the said George S. Bender, adm'r as aforesaid, his certain attorney, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of July, 1892.

Whereas lately, at Columbus, at the supreme court of the State of Ohio, in a suit pending in said court between The Pennsylvania Company and George S. Bender, administrator aforesaid, a judgment was rendered against the said Pennsylvania Company, and the said The Pennsylvania Company having obtained and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to said George S. Bender, administrator, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said The Pennsylvania Company shall prosecute its said writ and proceedings in error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE PENNSYLVANIA COMPANY. [SEAL.]
29 F. J. MULLINS. [SEAL.]
L. L. GILBERT. [SEAL.]
ENOCH TOTTEN. [SEAL.]

Sealed & delivered in presence of—

——— ———.

Approved this 25th day of July, 1892.

JOHN M. HARLAN,
Associate Justice Supreme Court of the U. S.

STATE OF OHIO, *City of Columbus,* } ss:

I, Urban H. Hester, clerk of the supreme court of Ohio, hereby certify the foregoing to be a true and correct copy of the original writ of error bond and of the approval endorsed thereon filed in my office on the 26th day of July, 1892, in the case of The Pennsylvania Company, plaintiff in error, *vs.* George S. Bender, administrator of the estate of Thomas J. Bender, deceased.

Witness my name and the seal of said supreme court this 22nd day of August, 1892.

Seal of the Supreme Court of the State of Ohio.

URBAN H. HESTER,
Clerk Supreme Court of Ohio.

[Endorsed:] The Pennsylvania Co. *vs.* George S. Bender, adm'r, &c. Writ of error bond. Filed July 26, 1892. U. H. Hester, clerk, by H. M. Crow, deputy. (Certified copy.)

Endorsed on cover: Case No. 15,112. Ohio supreme court. Term No., 1142. The Pennsylvania Company, plaintiff in error, *vs.* George S. Bender, administrator of the estate of Thomas J. Bender, deceased. Filed August 26th, 1892.

Office Supreme Court U. S.
FILED.
MAR 6 1893
JAMES H. McKENNEY,
CLERK.

CASE NO. 15,112.

Supreme Court of the United States.

OCTOBER TERM, 1892.

TERM No. 1,142.

THE PENNSYLVANIA COMPANY, Plaintiff in Error,

vs

GEORGE S. BENDER, Administrator of the Estate of Thomas J. Bender, deceased, Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

BRIEF FOR PLAINTIFF IN ERROR.

L. L. GILBERT,
J. R. CAREY,
F. J. MULLINS,
Attorneys for Plaintiff in Error.

LYMAN R. CRITCHFIELD,
Attorney for Defendant in Error.

Supreme Court of the United States.

THE PENNSYLVANIA COMPANY, Plaintiff in Error,

vs

GEORGE S. BENDER, Administrator of the Estate of Thomas J. Bender, deceased, Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS THE WRIT OF ERROR.

Defendant in error, in support of his motion, relies on the statutory provision of Ohio, that its reviewing courts can only consider errors appearing on the record. In other words he claims that plaintiff in error, after removing the case to the Federal Court, should have re-entered the State Court, and plead to the jurisdiction.

Plaintiff in error, in pursuing the remedy here sought, has followed the case of Kanouse vs. Martin, 15 How., 198. There, of course, the proceedings to remove had been begun in the Court where the case originated, yet the removal proceedings were no part of the technical record, as prescribed by the statute, and by the terms of the statute the reviewing court could only consider errors appearing upon such record. But it was held that, in order to protect the right of removal as secured by the act of Congress, the reviewing State Court should have disregarded the technical objection and inspected the removal proceedings, though they were no part of the record.

In the case at bar the reviewing Court was asked to go one step farther. The removal proceedings (under the act of 1887, Sec. 2, Clause 4,) were begun in the Federal Court and an order of removal there secured. This order, under the seal of the Court making it, was presented by the Petition in Error (R p 5,) and the State reviewing Court asked to inspect it, thus authenticated.

Under the Act of 1887 the right to make this order of removal was vested in the Federal Court, without any provision for notifying the State Court of its action. But its validity and effect are not conditioned upon anything further to be done by the party petitioning for it. The issuance of the order accomplishes the removal, and jurisdiction can only be reinvested in the State Court by an order remanding the cause.

Plaintiff in error therefore contends that the proceedings and judgment in the Common Pleas Court were *coram non judice*, and that it has a right to have examined the proceedings which rendered it such. The fact that these proceedings were had in another court is not controling; the vital point is that they were had in accordance with the act of Congress governing the matter and "binding upon all the Courts of the State;" the inherent power of the Court to give effect to the Act of Congress, is not abridged by the State Statute (6709) which provides that "a judgment rendered or final order made by the Common "Pleas Court may be reversed, vacated or modified by the "Circuit Court for errors appearing on the record."

'It is generally true that a party claiming a right under an act 'of Congress, must avail himself of some legal means to place on 'the record of the proper Court that claim, and the facts on 'which it rests; otherwise he cannot have the benefit of a re-'examination of the judgment upon a writ of error. But this 'duty does not exist in a case in which he cannot perform it 'without surrendering some part of the right which the act se-'cured to him, and in which the Court, where the matter is de-'pending, is expressly prohibited from taking any further 'proceeding. In this case the removal of the case to the Fed-'eral Court was complete and the power of the State Court at 'an end. To require the party removing the cause to plead 'further in the State Court, would deny him the right to have 'all proceedings in that Court cease, and would make all bene-'fit of that right dependant on his joining in further proceedings 'in a Court forbidden by law to entertain them. It would en-'graft upon the act of Congress a new proviso that, although 'the Court was required to proceed no further, yet it might 'proceed if the defendant should fail to plead to the jurisdiction; 'and that though the defendant had done all which the laws 'required to obtain the right to remove the suit, yet a judgment 'against him would not be erroneous, unless he should do more.'

From the journal entry in the Common Pleas Court, as embodied in the record, it would appear that the defendant below was present at the trial. This is not true; in fact it was not present and was totally ignorant of the trial when it took place; but the condition of the record in this respect escaped attention until too late to correct it. Yet this does not change the legal aspect of the case. Jurisdiction cannot be thus conferred, or rather transferred, for in this case one court must be divested of, and another invested with jurisdiction to render the judgment valid. In this case the requisite transcript had been made up by the Clerk of the Common Pleas Court and forwarded to the United States Court. This was presumably done in accordance with the order of removal. In the absence of any appropriate provision in the removal act, *certiorari*, or other proper writ would issue to require this transcript and would be notice to the State Court; the official act of the Clerk in conformity with the removal order is the same as though done in compliance with such writ. The petition in error avers that the State Court had notice in fact. There is nothing in the record to show that defendant below did anything else than submit to the requirement of the Court that the trial proceed.

Defendant in error complains solely of the remedy sought by plaintiff in error. On page 4 of his brief, he says: "The com-'plaint is, that about March 1st, 1888, he filed in the Circuit 'Court of the United States a petition and affidavit for removal 'and obtained an order that it was entitled to a removal of the 'case, and that after said order was made the Court of Common 'Pleas proceeded to judgment in the case. *This is true* and as a 'matter of law the court of common pleas may have had no 'jurisdiction, but the method adopted to raise that question was 'unknown to laws of the State, and was not and could not be 'decided by the supreme court of Ohio." Upon this statement of the case plaintiff in error is entitled to a remedy, either by an error proceeding as here sought, or by injunction.

L. L. GILBERT,
J. R. CAREY,
F. J. MULLINS,
Attorneys for Plaintiff in Error.

Office Supreme Court U. S.
FILED
SEP 21 1892
JAMES H. McKENNEY,
CLERK.

CASE No. 15,112.

Supreme Court of the United States.

OCTOBER TERM, 1892.
TERM NO. 1,142.

THE PENNSYLVANIA COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE S. BENDER, ADMINISTRATOR OF THE ESTATE OF THOMAS J. BENDER, DECEASED, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF DEFENDANT IN ERROR.

LYMAN R. CRITCHFIELD,
Attorney for Defendant in Error.

J. R. CAREY,
F. J. MULLINS,
Attorneys for Plaintiff in Error.

Supreme Court of the United States.

THE PENNSYLVANIA COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE S. BENDER, ADMINISTRATOR OF THE ESTATE OF THOMAS J. BENDER, DECEASED, DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR FOR THE MOTION TO DISMISS THE WRIT OF ERROR.

STATEMENT OF THE CASE.

The proceedings in the court of common pleas of Holmes County, Ohio, in this case commenced by petition. Record p. 6. An answer was filed by plaintiff in error (defendant below) which is a general denial. Record p. 7. After said petition and answer were filed, the plaintiff in error, (defendant below) filed a petition, affidavit and bond in said court of common pleas for a removal of said case to the circuit court of the United States for the Northern District of Ohio. Record pp. 8 and 9. The defendant in error (plaintiff below) filed his motion in the said court of common pleas to strike said removal papers from the files. Record p. 10. In said court of common pleas said motion was sustained, and said papers for removal were stricken from the files for the reasons alleged in said motion. Record p. 11. No exception was taken to this ruling although the plaintiff in error (defendant below) could have done so either then or thereafter during the term, or by subsequent motion or petition to vacate the judgment rendered in the said court of common pleas. The Record shows no effort in that direction. After

said removal papers were disposed of in the said court of common pleas, the plaintiff in error (defendant below) to-wit:

On March 6th, 1888, obtained an order in the circuit court of the United States for the Northern District of Ohio to the effect that it was entitled to remove the case to that court. Record p. 5. This order is Exhibit B referred to and attached to a petition in error filed in the circuit court of the State. Record pp. 3 and 4.

Afterwards and at the May term, 1888, of the court of common pleas of said Holmes County, trial of said cause was had, and judgment was rendered against plaintiff in error (defendant below.) Record p. 12. The Record fails to disclose that either before or after the rendition of the judgment in said court of common pleas, the plaintiff in error (defendant below) made any effort to inform the common pleas court or the defendant in error (plaintiff below) of the order of the circuit court of the United States as to the removal of said cause, or to move for a new trial or take exceptions to the judgment of said court of common pleas; but said plaintiff in error (defendant below) about the 6th day of July, 1888, filed its petition in error in the circuit court of the State setting forth the proceedings in the said circuit court of the United States as matters of fact for the first time appearing in the record of said case in the State court. Record pp. 3 and 4. To this petition in error defendant in error, (defendant in error in said circuit court of the State) filed his motion "to strike from the files the petition in error filed in this case for the reason that said petition in error does not set out any error appearing upon the records, and that the said circuit court has no jurisdiction to hear and determine the matters set forth in said petition in error." Record p. 6. Which motion was sustained by said circuit court of the State, and to which the plaintiff in error (also plaintiff in error in the said circuit court of the State) excepted, Record p. 6, and thereupon filed his petition in error in the supreme court of the state to reverse the decision of the said circuit court. Record pp. 1 and 2.

It will be observed that the question raised by the defendant in error in the circuit court of the state (also there defendant in error) was that said circuit court had erred in holding that the petition in error did not set out any error appearing upon the record and that it had no jurisdiction to hear and determine the matters of fact set up. This was the only question presented to the supreme court of the State. It was the *method* or *manner* of raising the question in the State court and not the effect of the removal order made by the circuit court of the United States that was in question.

Out of this statement of fact the questions arise:

1. That the State court has exclusive cognizance of pleading and practice under the statutes of the State.

2. That the decision of the supreme court of the State did not involve any question of which the supreme court has jurisdiction under the constitution and laws of the United States.

MOTION TO DISMISS THE WRIT OF ERROR.

The following is the motion filed in this case to dismiss the writ of error:

IN THE SUPREME COURT OF THE UNITED STATES.

THE PENNSYLVANIA COMPANY, Plaintiff in Error,
vs.
GEORGE S. BENDER, Administrator of the Estate of Thomas J. Bender, Deceased, Defendant in Error.

Now comes George S. Bender, administrator of the estate of Thomas J. Bender, deceased, defendant in error, and for the sole purpose of settling the question of the jurisdiction of this court, files this his motion to dismiss the writ of error heretofore issued in this case against said defendant in error, and against the supreme court of the State of Ohio, because he says that this court has no jurisdiction of said cause for its determination, for the reasons following:

First. The judgment of the supreme court of the State of Ohio is founded upon statutes of said state determining the jurisdiction of of both the circuit and supreme courts of the State, to review errors of the common pleas courts of the State, and said statutes are as follows:

Revised Statutes of the State of Ohio of 1891. "Section 6709. A judgment rendered, or a final order made by the common pleas court, may be reversed, vacated, or modified by the circuit court, for errors appearing on the record."

"Section 6710. A judgment rendered, or final order made, by the circuit court, any court of common pleas, probate court, or the superior court of any city or county, may be reversed, vacated, or modified by the supreme court, on petition in error, for errors appearing in the record."

That the circuit court of the State of Ohio can review errors of record only, in the court of common pleas of said state, and the supreme court of said State has no higher jurisdiction. The matters and things set forth in said Writ of Error, were no part of the record in the court of common pleas of said State, but were first made a part of the record in the circuit court of said State.

That the said supreme court of the State of Ohio has final jurisdiction of said questions so arising on said statutes, exclusive of this court.

Second. Out of the matters and things set forth in said Writ of Error, and the record therein referred to, there is not drawn in question the validity of a statute of, or an authority exercised under, the United States; nor the validity of a statute of, or an authority exercised under, the said State of Ohio, on the ground of their being repugnant to the constitution, or laws of the United States; nor is

any right claimed under the constitution, or any statute of the United States, nor could the supreme court of the State of Ohio decide upon the validity of any statute, or claim of the plaintiff in error, until the questions arising thereon appeared upon the record of the court of common pleas of said State. No question arises under Section 709 of the laws of the United States. Revised Statutes of the United States page 132.

Third. This court has no jurisdiction to issue said Writ of Error, nor to hear and determine the matters referred to therein, and properly arising on the record.

LYMAN R. CRITCHFIELD,

Attorney for Defendant in Error.

ARGUMENT.

First. For reasons not apparent the plaintiff in error (defendant below) embraces in the Record pp. 8 and 9 the petition and affidavit for removal filed in the court of common pleas of said Holmes County under the Third Section of the Act of Congress of March 3d, 1887, Second Session of the 49th Congress, pp. 552, 553 and 554. Said Third Section provides as follows: "That whenever any party entitled to have any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a State court to the circuit court of the United States, he may make and file a petition in such suit in such state court, at the time, or any time before the defendant is required by the laws of the State or the rules of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the circuit court, etc."

The petition and affidavit mentioned on pp. 8 and 9 of the Record were filed after the time for answer by the laws of the State, etc., and were stricken from the files for that reason. Record pp. 10 and bottom of p. 11. The action of the court of common pleas of Holmes county in this regard was not made the basis of any review by a higher court and the plaintiff in error, (defendant below) at no time has claimed anything for said attempt at removal under the Third Section of said Act of Congress.

Second. The complaint of the plaintiff in error is found in his petition in error in the circuit court of the State. Record pp. 3 and 4. The complaint is that about March 1st, 1888, he filed in the circuit court of the United States a petition and affidavit for removal and obtained an order that it was entitled to a removal of the case, and that after said order was made the court of common pleas proceeded to judgment in the case. This is true and as a matter of law the court of common pleas may have had no jurisdiction, but the *method* adopted to raise that question was unknown to the laws of the State, and was not and could not be decided by the supreme court of Ohio.

To raise such question and have it passed on by either the circuit court of the State or the supreme court of the State, it was necessary that the plaintiff in error (defendant below) should have instituted proceedings in the court of common pleas to make the action of the circuit court of the United States a part of the Record in said court of common pleas.

The jurisdiction of the circuit court of the State and of the supreme court of the State is not original but appellate or in error. Revised Statutes of Ohio, Sections 6709 and 6710 as quoted above in the motion to dismiss the writ of error. The expression, in both said sections "for errors appearing on the record" are universal and fundamental in the jurisdiction of the State courts.

The constitution of the State of Ohio Art. 4, Sec. 2, provides as to the supreme court of the State: "It shall have original jurisdiction in quo warranto, mandamus, habeas corpus and procedendo, and such appellate jurisdiction as may be provided by law." And Sec. 6 of the same Article provides that, "The circuit court shall have like original jurisdiction with the supreme court, and such appellate jurisdiction as may be provided by law."

Said sections 6709 and 6710, so far as the question in hand is considered, confer the appellate jurisdiction on said State courts.

No decision can be found of the courts in Ohio otherwise than as repeatedly affirming that error lies only "for error appearing on the record."

The supreme court of Ohio, in the case of *Shelby et al. vs Hoffman, 7 O. S. R., p. 450, 3d syllabus*, says: "That in such a case the proper remedy for the defendant is the ordinary one of petition in error, the facts being made to appear upon the record by plea to the jurisdiction or by bill of exceptions." This case was a removal cause neglected to be perfected as a part of the record in the common pleas court, and the substitution of proceedings in mandamus sought as a remedy.

In 30 O. S R., p. 418, 1st syllabus, the supreme court says:

"An alleged error not appearing on the record cannot be considered by a reviewing court."

The court says, p. 425: "The first error there assigned, was that the court of common pleas erred in sustaining the demurrer of plaintiff below to defendant's second ground of defense, in their original answer contained. The record does not show that any such demurrer was interposed by plaintiff below or sustained by the court. The alleged error, not appearing on the record, cannot be considered."

It is not thought necessary to multipy authorities on this question. The petition in error filed by plaintiff in error in the circuit court of the state, Record, pp. 3 and 4, alleges no error of the record brought up from the court of common pleas, but sets out facts never theretofore any part of the record in any court of the State, and to emphasize the idea that the circuit court of the state had original jurisdiction, the petition is sworn to. The facts alleged are traversable and might require a trial to determine the truth of them. That this could be done in the circuit court of the state ignores all its

legislation and judicial history. The sole question presented by the Record p. 6 was whether the circuit court of the State had jurisdiction or could reverse the common pleas for a matter never before the latter court, and involved the construction of our State statutes, and this was passed upon by the supreme court of the State. It was the only question necessary to be passed upon.

The assignment of errors on page 13 of the Record, assigns for error that the supreme court of Ohio, erred in affirming the judgment of the circuit court of Holmes county, in holding that it could only hear errors appearing on the record and had no original jurisdiction. The assignment of errors attempts to inject into the proceedings, without the slightest proof in the record, that both the circuit and supreme courts of the State decided that the court of common pleas had jurisdiction notwithstanding the removal proceedings in the circuit court of the United States. Nothing of the kind was decided. The motion which was sustained, Record p. 6, limited the question to the very terms of the motion.

Third. The plaintiff in error (the same in the supreme court of Ohio) is understood to rely on the case of *Kanouse vs. Martin, 15 Howard, p. 198.*

That was a suit originally begun in the court of common pleas for the City and County of New York. The defendant, under the Act of Congress then in force, filed in the State court a petition and bond for removal to the United States Court; whereupon the plaintiff reduced his claim below the amount necessary for such removal and the State court proceeded with the case, rendering judgment against the defendant who then prosecuted error to the superior court. That court affirmed the common pleas on the ground that under the statute of New York it could only consider errors appearing on the record and that the removal proceedings was not, under the statute, a part of the record. The case was then taken on error to the Supreme Court of the United States. In the decision there rendered, the Court says, on page 208:

"But it is objected that this is a writ of error to the superior "court, and that by the local law of New York, that court could not "consider this error in the proceedings of the court of common pleas, "because it did not appear upon the record, which, according to the "law of the State, consisted only of the declaration, the evidence of "its service, the entry of the appearance of the defendant, the rule to "plead, and the judgment for want of a plea, and the assessment of "damages; and that these proceedings, under the Act of Congress, "not being part of this technical record, no error could be assigned "upon them in the superior court. This appears to have been the "ground upon which the superior court rested its decision. That it "was correct according to the common and statute law of the State "of New York, may be conceded. But the Act of Congress which "conferred on the defendant the privilege of removal, and pointed "out the mode in which it was to be claimed, is a law binding upon "all the courts of that State; and if that act both rendered the judg-"ment of the court of common pleas erroneous, and in effect gave the

"defendant a right to assign that error, though the proceeding did "not appear on the technical record, then, by force of that Act of "Congress, the superior court was bound to disregard the technical "objection, and inspect these proceedings." * * * * *

On page 210, the Court further says:

"It is as true in this court as in the superior court of New York, "that, upon a writ of error, this court looks only at the technical "record, and affirms or reverses the judgment, according to what "may appear thereon. But this is only one of the rules of evidence "for the exercise of its jurisdiction as a court of error; it prescribes "what shall and what shall not be received as evidence of what was "done in the court below; and when an Act of Congress cannot be "executed without disregarding this general rule, it becomes the duty "of this court to disregard it. The plaintiff in error, having a right "to have the erroneous judgment reversed, must also have the right "to have the only legal proceedings, which could be had consistently "with the Act of Congress, examined to show that error."

If the record indicated in the above case had been made in the court of common pleas of Holmes County, and taken up to the circuit court of the State, no motion would or could have been made to strike the petition in error from the files.

The Supreme Court of the United States in the case of Kanouse vs Martin, had always present a record, and the decision in the case determined that all the proceedings in the court of common pleas including the removal papers filed in that court constituted the record.

In the numerous removal cases decided by the supreme court of Ohio, none can be found which hold that removal papers filed in the court of common pleas are not part of the record.

In the case of Kanouse vs Martin, the removal papers were a part of the record from the court of original jurisdiction in the State, to the Supreme Court of the United States. The decision of the courts of New York that removal papers were not a part of the record was in contravention of the statute of the United States then authorizing such removal papers to be filed in the State court, and of the statute of the United States giving jurisdiction to the Supreme Court of the United States where a right claimed under such statute is refused, but in the case at bar there were no removal papers filed nor attempted to be and no effort made to make the action of the circuit court of the United States a part of the record.

Presumably the writ of error was issued in this case as involving some question under the following statute of the United States:

"SECTION 709. A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question, the validity of a treaty or statute of, or on authority exercised under any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity: or where any title, right, privilege or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised

under, the United States, and the decision is against the title, right, privilege or immunity, specially set up or claimed by either party, under such constitution, treaty statute, commission or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States; and the proceeding upon the reversal shall be the same, except that the Supreme Court may, at their discretion, proceed to a final decision of the case, and award execution, or remand the same to the court from which it was so removed.

The Supreme Court may re-affirm, reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ."

We respectfully submit that no question arises in this case which comes within the foregoing Section of the Act of Congress, or is referred to in said Writ of Error or of which the Supreme Court of the United States has jurisdiction.

LYMAN R. CRITCHFIELD,

Attorney for Defendant in Error.